U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 July 2003

CASE NO.: 2002-LHC-2516

OWCP NO.: 08-114826

IN THE MATTER OF:

MICHAEL G. KING

Claimant

v.

VASTAR RESOURCES, INC.

Employer

ACE USA

Carrier

APPEARANCES:

LEWIS FLEISHMAN, ESQ.

For The Claimant

JOHN R. WALKER, ESQ.

For The Employer/Carrier

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Michael G. King (Claimant) against Vastar Resources, Inc. (Employer) and ACE USA (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of

Hearing was issued scheduling a formal hearing on February 3, 2003, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The parties proffered 38 joint exhibits which were admitted into evidence. Claimant and Employer/Carrier submitted post-hearing briefs. This decision is based upon a full consideration of the entire record. [1]

Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Claimant and Employer/Carrier stipulated (JX-38), and I find:

1. That Claimant's accident/injury occurred on June 17, 1998.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on June 17, 1998.

5. That Employer/Carrier filed Notices of Controversion on September 28, 2001 and August 6, 2002.

6. That an informal conference before the District Director was held on June 28, 2000.

7. That Claimant received temporary total disability benefits from June 18, 1998 to November 19, 1998; from November 23, 1998 to June 9, 1999; from June 21, 1999 to August 5, 1999; and from April 25, 2000 to September 30, 2001, a total of 103 weeks at a compensation rate of $814.33 and 26 days at $116.33 per day for a total of $86,900.58.

8. That Claimant's average weekly wage at the time of injury was $1,414.14 yielding a compensation rate of $835.74.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; and Joint Exhibits: JX-___.

9. That medical benefits have been paid pursuant to Section 7 of the Act.

10. That Claimant will have an earning capacity of $27,500.00 per year commencing May 15, 2003.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of Claimant's disability.

2. Date of maximum medical improvement.

3. Attorney's fees and interest.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Claimant

Claimant was 39 years old at the time of the formal hearing and graduated from high school in 1981. (Tr. 29). He has worked offshore since 1983 and began employment with Employer in 1985. (Tr. 30-31). He progressed from the position of number three operator to number one operator at the time of his accident/injury on June 17, 1998. As a number one operator, or lead operator, Claimant "pretty much took care of the whole platform," "including the flow of gas, the rate, all of the maintenance. Just your everyday production." (Tr. 31; JX-26, p. 5).

He was working on Matagorda Island 703A located on the outer continental shelf when his accident occurred. (Tr. 32). He testified that he would get onto and off various platforms by helicopters, personnel baskets and thirty percent of the time he "swung by rope" from the boat to the platform. (Tr. 32-33).

His job tasks involved working overhead with his dominant right shoulder and arm, opening up wing valves, climbing ladders, working on pressure safety equipment, hooking up high-pressure hoses and testing equipment. He used torque wrenches, pry bars and cheater pipes on overhauls and generators. (Tr. 34). Because of the saltwater and corrosive environment, two and one-half pound brass hammers and eight-pound sledge hammers were used to open up valve handles. (Tr. 35-36). He also assisted mechanics with mechanical repairs of generators, pumps and compressors, as well as performing preventive maintenance on such equipment. (Tr. 36). He

performed rigging which required the overhead use of his right shoulder and arm and operated a crane. (Tr. 37). He climbed a straight ladder "hand over hand" to ascend the crane. (Tr. 38). In the performance of his job, he was required to lift 50 to 100 pounds "pretty regularly" and, with assistance, moved 300-pound drums of chemicals. (Tr. 39-40).

Claimant described the valve and bonnet he was trying to open when his accident occurred. (Tr. 41; See JX-37). He was standing over the valve as he struck the valve bonnet handle when it came apart under 1,040 pounds per square inch of pressure and blew off striking him in his right shoulder and upper biceps area. (Tr. 41-48). He stated "it took my whole right - - my right arm and shoulder all the way out to - - I don't know, way back there. It almost took it off." (Tr. 49).

Claimant was flown off the platform to Corpus Christi where he sought medical attention at Spohn Memorial Hospital emergency room and from Dr. Heckman, an orthopedic specialist. (Tr. 49-50). He was subsequently referred to Dr. Ryan for pain management and ganglion stellate blocks and to Dora Partridge for physical therapy. (Tr. 50). He recalled about July 15, 1998, his biceps problems started to quiet down, but his shoulder problem became worse. His shoulder began to lock up and he could not move it. (Tr. 50-51). Dr. Edwards replaced Dr. Ryan as his pain specialist and recommended, along with Dr. Heckman, the insertion of a spinal cord stimulator to interfere with the shoulder pain, but he declined the recommendation. Instead, he elected to treated with a TENS unit, medication, including Neurontin and Amitriptyline, and ganglion blocks. (Tr. 52).

Claimant testified that Dr. Heckman performed surgery on his right shoulder on June 21, 1999, removing a bursa sac. (Tr. 55-56). In November 1999, he attempted a trial work period by returning to the platform for Employer, but by March 8, 2000, he was unable to continue. (Tr. 56). Claimant stated he had problems running the crane and using the hammers with his left hand. (Tr. 56-57). On May 2, 2000, Dr. Heckman recommended that Claimant seek retraining and Claimant sought vocational rehabilitation from the U.S. Department of Labor (DOL). (Tr. 57-58). Donna Johnson, a vocational rehabilitation specialist, was appointed to work with Claimant. (Tr. 58).

After aptitude and interest testing by Dr. Weiner, Ms. Johnson devised a two-year Associate's Degree program for Claimant in industrial management. Claimant enrolled in the DOL-sponsored and approved vocational rehabilitation program in August 2000 and has been going to school full-time since. (Tr. 60). He also devoted

time to family issues involving his son when possible. Claimant testified he had to seek tutoring and remedial help initially in Math and English to remain in the program. (Tr. 59). He testified that his school program has precluded him from obtaining outside work since August 2000. (Tr. 60). He is on track to graduate in May 2003. He stated the program has been hard for him because it is a "whole career change." (Tr. 61).

Claimant testified he is prevented from performing his former job because of physical problems with his right shoulder which preclude his reaching out and grabbing something and pulling it to him, and not being able to reach over his head. (Tr. 63). He doubts he could climb a ladder and would not even attempt to use a swing rope. He does not have the strength to use a torque wrench or sledge hammer. Dr. Heckman has not released him to return to his former job since recommending retraining in May 2000. No physician who treated Claimant has recommended that he return to his prior employment. (Tr. 64). Claimant testified that he is in continuous pain which is affected by any motion or activity with his right shoulder. His pain is reduced if he lays down with a heating pad or uses his TENS unit. (Tr. 65).

Claimant stated he saw Dr. Bryan on one occasion for about 20 minutes and Dr. Simpson on one occasion who "pretty much agreed with Heckman, my primary doctor." (Tr. 66-67). He stated he believed Dr. Heckman had more insight into his shoulder condition because "he's been there from the get-go with me," and has seen his shoulder when its flaring up and when it is in remission. (Tr. 68).

On cross-examination, Claimant acknowledged that he has two puncture wounds on his upper right arm from the bonnet hitting him. (Tr. 70). He clarified that the bonnet "took my whole shoulder out of whack," "and just took it way up and back around, and it messed this whole thing [shoulder] up here." (Tr. 71-72). His current primary problem is pain in his right shoulder. (Tr. 72).

He further acknowledged that Ms. Johnson discussed jobs that he could perform which were clerical work as a medical transcriber and motel desk clerk, but did not discuss the pay of such jobs. (Tr. 74). Claimant stated that if he had not been in school for the last three years he could have worked. However, he could not have worked a part-time job even for ten hours per week during his college retraining because he could not complete his schooling "on the level that I want to complete it," adding "I don't have ten hours . . . I'll be lucky if I get four hours of sleep a night." (Tr. 75).

Claimant also testified that he wanted to attend two more years of college to continue his education, but would do so part-time and at night. (Tr. 77). He intends to obtain a full-time job and attend classes at night school. (Tr. 78). He stated that since his injury at Employer, he has not applied for a job at any location. (Tr. 81). Employer paid his wages while he attempted his trial work period from November 1999 through March 8, 2000. (Tr. 81-82). He did not return to offshore work after March 8, 2000. (Tr. 83).

The Medical Evidence

Dr. Michael M. Heckman

Dr. Heckman, a board-certified orthopedist, was deposed by the parties on December 18, 2002. (JX-27). His practice is limited to shoulder and knee related injuries. He has been treating Claimant since July 1, 1998, for his industrial accident/injury when a valve under pressure blew and struck him in the upper biceps injuring his right arm and shoulder. (JX-27, pp. 2-3). Dr. Heckman also diagnosed Claimant with reflex sympathetic dystrophy (RSD) of the right upper extremity, for which he referred Claimant to Dr. Ryan, a pain management specialist. (JX-2, p. 55; JX-2, p. 55).

Claimant was treated conservatively with medications, injections and physical therapy until an arthroscopic procedure was performed on June 21, 1999, as a diagnostic tool to determine structural reasons or problems for his ongoing shoulder complaints or the effects of his June 17, 1998 accident/injury. Dr. Heckman testified that the procedure was warranted since Claimant had findings consistent with a derangement in the shoulder or an ongoing bursitis or problems associated with his subacromial space. (JX-27, pp. 3-4; JX-2, pp. 27-28, 31, 33). During the procedure, Dr. Heckman resected a fraying glenoid labrum or cartilage rim around the socket of the shoulder. He also removed bursal tissue over the rotator cuff which was heavily scarred and placed a scarlata pain management post-operative infusion pump. (JX-27, p. 3).

Dr. Heckman testified that RSD is a problem that can occur and is associated with sympathetic pain pathways in the human body which results in feedback and overload of the pathways causing significant pain or discomfort. A regional chronic pain syndrome can be inclusive of RSD and the variations in terms of diagnosis between the two conditions could be better defined by a pain management specialist according to Dr. Heckman. (JX-27, p. 2). Dr. Heckman opined that any injury to peripheral nerves, even a contusion, can set off the process of RSD. He opined that medical

literature supports an association of RSD with crushing oriented injuries to the tissue as well as ischemic type injuries. (JX-27, p. 6).

Post-operatively, Claimant again underwent physical therapy and continued on his medications and some blocks by Dr. Edwards for controlling his pain from the RSD symptoms. Claimant appeared to be improving and underwent an impairment rating assessment on October 7, 1999. (JX-2, pp. 21-22). Dr. Heckman opined that Claimant's RSD has been chronic and Dr. Edwards, the pain management specialist, has discussed other treatment options with Claimant to include invasive methods such as the implant of a spinal stimulator. (JX-27, p. 4).

Claimant has had intermittent flare-ups of his symptoms of RSD since his injury. Claimant attempted to return to work, but in March 2000 he returned to Dr. Heckman with a flare-up in his condition and was being treated by Dr. Edwards with blocks. On May 2, 2000, Dr. Heckman wrote a letter opining that Claimant was not able to perform his former job duties and recommended that he undergo retraining. (JX-2, p. 13). Claimant was held off work on May 9, 2000. (JX-2, p. 12).

Dr. Heckman further stated that the duties of Claimant's former job, such as having to torque valves with a pipe wrench, use a brass hammer to strike metal to free up frozen parts, climb ladders or swinging to and from the offshore platform and pushing and pulling with both arms, were strenuous activities which will potentially have an effect of flaring up his RSD condition. Dr. Heckman stated Claimant was permanently restricted from engaging in such activity in the future. (JX-27, p. 7). Dr. Heckman placed Claimant at maximum medical improvement from an orthopedic standpoint on November 19, 1999. (JX-27, p. 5; JX-2, p. 18). Claimant was assigned a nine percent impairment rating for his right upper extremity and a five percent whole person impairment rating. (JX-27, p. 6).

Dr. Heckman testified that Dr. Edwards has prescribed the use of a TENS unit for Claimant to help reduce the pain patterns which caused an adhesive base reaction and rash on Claimant's right shoulder. (JX-27, p. 6).

On June 7, 2000, Dr. Heckman assigned limitations for Claimant under which he should work with his right arm in the future. (JX-2, p. 10). He continued to treat Claimant for episodic problems associated with his RSD and increasing discomfort in his right shoulder. (JX-2, pp. 6-8). As of August 20, 2001, Dr. Heckman opined that Claimant's medical condition prevented him from

returning to work since he was in a Department of Labor retraining program. (JX-2, p. 5). On April 1, 2002, Dr. Heckman opined that Claimant could not return to work until he completed school. (JX-2, p. 1).

An OWCP-Form 5 completed by Dr. Heckman on April 1, 2002, restricted Claimant, due to his chronic shoulder problems from his job injury, from lifting more than 20 pounds intermittently up to one hour per day; no climbing; intermittent twisting up to one hour per day; no pushing or pulling with the right shoulder; no reaching or work above the shoulder on the right; no crane operation; limited operation of other motor vehicles; environmental restrictions concerning cold, dampness, temperature changes and high speed working which irritates his shoulder; no full-time (8 hours per day) or part-time work (0-8 hours per day) until "after completion of retraining." (JX-2, p. 2).

On cross-examination, Dr. Heckman acknowledged that Claimant had essentially two problems, an orthopedic problem with his bursa and subacromial joint of the right arm and shoulder and the effects of RSD. (JX-27, p. 7). Claimant's impairment rating was associated only with an orthopedic loss of or reduction in range of motion of the right shoulder and not any effects associated with RSD. (JX-27, pp. 7-8, 9). Dr. Heckman opined that with retraining Claimant would be employable but in "something much more sedentary that wouldn't involve strenuous activity of his right upper extremity." He cautioned against Claimant performing strenuous and repetitive activity with his right arm. (JX-27, p. 8). Dr. Heckman's prognosis was that having had RSD for a length of time and it continuing to re-flare was "not very good for getting rid of the condition" which may be "an ongoing problem for [Claimant]." (JX-27, pp. 9-10).

Dr. Christopher Ryan

Dr. Ryan initially examined Claimant on August 13, 1998, based on a referral from Dr. Heckman to the Corpus Christi Medical Center. (JX-16, p. 11). Upon physical examination, Dr. Ryan noted Claimant's right upper extremity felt slightly warmer to touch and had evidence of "hydrosis" when compared to the left upper extremity. Grip strength was diminished in the right upper extremity and Claimant had difficulty abducting his right arm due to the pain. Dr. Ryan's assessment was Claimant had "probable reflex sympathetic dystrophy following traumatic injury to the right bicep." He opined that Claimant was a candidate for a series of stellate ganglion blocks for treatment of the RSD. (JX-16, pp. 11-13).

On August 27, 1998, Claimant returned to Dr. Ryan for re-evaluation and a stellate ganglion block to treat his RSD. (JX-16, pp. 7-8). On September 4, 1998, Claimant was examined and treated by Dr. Hagemeister. It was noted that Claimant had undergone two stellate ganglion blocks and one-half of his pain was gone, profuse sweating at the wrist had ceased with less tingling in his right hand and his range of motion of his right shoulder without pain had largely improved. Dr. Hagemeister opined Claimant's symptoms were consistent with sympathetically maintained pain syndrome and that Claimant needed to undergo five stellate blocks. He administered a third stellate block on this visit. (JX-16, pp. 9-10).

On February 8, 1999, Claimant was again evaluated by Dr. Ryan. It was noted that Claimant had been released to light duty and had returned to Employer on November 13, 1998 to perform mostly desk duty four to eight hours a day. Dr. Ryan noted Claimant was having stability problems with his right shoulder region and an ache in his shoulder and a "catch" when he extends his right upper extremity. Dr. Ryan opined that Dr. Heckman was considering shoulder arthroscopic surgery to evaluate the joint for possible stability problems and saw no contraindication for the surgery given Claimant's history of RSD. (JX-16, pp. 34-35).

Dr. Fred L. DeFrancesco

On February 24, 1999, Dr. DeFrancesco, a board-certified orthopedist, examined Claimant at the behest of the Carrier. (JX-5). His exam was conducted for evaluation only and "not for care, treatment or consultation." (JX-5, p. 7). He reviewed certain medical records, not specifically identified, from Spohn Memorial Hospital, Dr. Heckman and Dr. Ryan. His physical examination of Claimant included measurement of his range of motion of the upper extremity which was reduced and attributed to "adhesive capsulitis." (JX-5, p. 11).

Neurological testing, muscle strength, vascular examination and joint stability were normal. (JX-5, p. 12). Dr. DeFrancesco diagnosed blunt trauma to the right biceps followed by early reflex sympathetic dystrophy which is apparently resolved with stellate blocks and adhesive capsulitis of the shoulder secondary to trauma with limitation of motion. He found no objective evidence of reflex sympathetic dystrophy, but suggested an arthroscopic decompression "could be considered viable" for the adhesive capsulitis and "at that time manipulation under anesthesia of the shoulder would be possible." He opined Claimant had not reached maximum medical improvement. (JX-5, p. 14).

Dr. Charles W. Breckenridge

Dr. Breckenridge, an orthopedist specializing in shoulder surgery, performed a second opinion evaluation of Claimant on April 8, 1999, at the request of Carrier. He noted Claimant had been treated conservatively and "evidentially did contact reflex sympathetic dystrophy." (JX-6, p. 1). After physical examination, Dr. Breckenridge assessed Claimant as status post contusion injury right upper extremity with symptoms consistent with rotator cuff tendinitis, no obvious instability and a significant history of reflex sympathetic dystrophy.

He recommended continued conservative care with a second Cortisone and Lidocaine injection both for diagnostic and possible therapeutic reasons. If symptomatic relief was received but his symptoms were to recur, it may be reasonable to consider a diagnostic arthroscopy "as a last resort in that his risk of recurrence of reflex sympathetic dystrophy is real." On examination, Dr. Breckenridge did not feel Claimant exhibited any significant symptoms of RSD. (JX-6, pp. 2-3). He rendered no opinion regarding maximum medical improvement.

Dr. David H. Trotter

On June 8, 2000, Dr. Trotter, a board-certified orthopedic surgeon, provided a review of certain medical records of Claimant at the behest of Carrier. (JX-9). He concluded that the request for a "spinal cord stimulator does not appear to be directly related, reasonable or necessary for the work injury that was sustained on 6/17/98."

It was his impression that "the totality of the documentation does not support clinical objective findings that would at all be considered compatible with a diagnosis of Reflex Sympathetic Dystrophy." He opined the "end treatment date" "should be considered to have occurred on or prior to approximately 3 months post the apparent surgical procedure that took place on 6/21/99" or approximately 9/21/99. He considered the latter date as the date of maximum medical improvement. (JX-9, p. 7).

His impression was that after 9/21/99, Claimant had no "indication for any active or ongoing or future treatment with regards to physician and/or therapy visits, medications, durable medical equipment, injections, health club memberships and/or any surgical intervention at all related to the injury that was sustained on 6/17/98." He further concluded that there was "no medical indication whatsoever for any further treatment including but not limited to medications and the spinal cord stimulator . .

. after approximately 9/21/99, there was no apparent medical indication for active treatment at all causally related to the 6/17/98 date of injury." (JX-9, p. 8).

Dr. Richard K. Simpson, Jr.

Dr. Simpson, a board-certified neurosurgeon, performed an independent medical examination of Claimant on January 29, 2001, at the request of DOL. His evaluation reveals that Claimant's chief complaint was RSD. Claimant was present to discuss other options for his management. (JX-11, p. 40). After a neurological examination, Dr. Simpson noted that he did not think any other surgical intervention would be necessary for Claimant's pain, which was being managed "quite well on medications and with a TENS unit." However, he opined it was "possible that [Claimant's] pain may increase in the future, and that additional surgical procedures may be necessary." Dr. Simpson further opined no additional intervention from a medical or surgical standpoint was necessary at that time. (JX-11, p. 41). Dr. Simpson did not render an opinion of whether Claimant had reached maximum medical improvement.

Dr. William J. Bryan

Dr. Bryan, a board-certified orthopedist, performed an independent medical evaluation of Claimant on January 31, 2001 at the request of DOL. (JX-14). He was deposed by the parties on January 16, 2003. (JX-31). Dr. Bryan saw Claimant on only one occasion, although he noted that if Claimant had any questions about his progress he should return to see Dr. Bryan in May 2001. (JX-31, p. 2; JX-14, p. 30).

Dr. Bryan reported Claimant denied that the skin over his shoulder was ever shiny or that there was sensitivity to light touch. He testified that in classic RSD the skin is shiny and very sensitive to touch, even "the wind blowing through a window," and it is extremely painful to move the entire extremity. He concluded that Claimant did not have classic RSD. (JX-31, p. 3).

After examination, Dr. Bryan opined his impression was Claimant had blunt trauma to the anterior aspect of his right shoulder and had undergone numerous pain blocks by chronic pain specialists. He concluded there was "no evidence of a structural injury to [Claimant's] right shoulder as far as the bones, muscles or ligaments." He reported that he reassured Claimant he "should enjoy a complete recovery within the next 9 months." He further opined that Claimant would not be able to lift over 30 pounds with his right upper extremity until May 1, 2001, after which Claimant "could gradually increase his lifting activity." He rendered no opinion

regarding maximum medical improvement or disability, instead "strongly" recommending that Dr. Heckman do so. (JX-14, p. 30).

On cross-examination, Dr. Bryan acknowledged a physician gains insight in treating individuals over a period of time in observing periods of remission and exacerbation of symptoms. (JX-31, p. 3). He distinguished between RSD and chronic pain syndrome as the latter having no definable causation or diagnosable signs. He opined that Claimant could be suffering from chronic pain syndrome and yet not have signs of classic RSD. (JX-31, pp. 3-4). He agreed that a greater amount of palmar sweat, warmth of the area and a reddish hue, as noticed by Dr. Simpson, could buttress a chronic pain syndrome diagnosis. He also agreed that the force or energy of the valve striking Claimant "could certainly do damage to the soft tissues." He testified that when Claimant discontinued Neurontin he became worse and his understanding is that Neurontin decreases the sensitivity or irritability of damaged nerves.

Dr. Bryan agreed that exertion of pressure on wrenches under torquing and swinging from a rope to and from a platform would aggravate an underlying chronic pain syndrome and should be avoided. He stated Dr. Heckman should assign maximum medical improvement and disability because he was a good orthopedic surgeon, had known Claimant longer and Dr. Bryan was only seeing Claimant one time. (JX-31, p. 4).

The Vocational Evidence

Donna Johnson

Ms. Johnson is a licensed rehabilitation counselor and certified by DOL to handle rehabilitation referrals from the agency. (JX-17). As a certified DOL rehabilitation counselor, she evaluates the potential of injured workers to return to employment, their availability to participate in a vocational rehabilitation program, identifies a vocational objective, devises a return to work plan and implements and follows through with such plans for employment of the injured worker. (JX-25, p. 30).

Ms. Johnson first met with Claimant on June 1, 2000, after a May 24, 2000 referral from DOL. (JX-17, p. 12). She referred Claimant to psychological and aptitude/intelligence/interest testing with Dr. Don Weiner, a licensed psychologist. (JX-25, pp. 3-4). A rehabilitation plan was devised for Claimant to attend a two-year course beginning in the Fall 2000 to obtain an Associate's Degree in Industrial Management at Del Mar College in Corpus Christi, Texas. (JX-25, pp. 3, 5). The objective was to find an alternative occupation which would allow Claimant to work with his mind and to

reduce the repetitive use of his dominant right extremity. (JX-25, p. 5).

Ms. Johnson testified that she is only referred cases by DOL when the person involved can no longer do their past relevant work and it has been determined by a physician that the person cannot function at the level of his former employment and can only function at a reduced physical capacity. (JX-17, p. 85). She noted Claimant attempted to return to his former job, but was not able to perform his former duties. She stated Claimant was physically required to stoop, balance, lift, carry, push, pull and climb in his past job using his entire body to do his job. He was also required to perform overhead lifting with his right shoulder. She categorized Claimant's former position to be a heavy exertional job. (JX-25, p. 4).

Ms. Johnson concluded that Claimant was motivated and committed with a desire to return to work and, despite his intelligence testing results, determined Claimant could succeed in the course with tutors and remedial course work. (JX-25, pp. 5-6). The program is sponsored by DOL which pays for Claimant's tuition, books, supplies and provides a $25.00 per week maintenance allowance for his travel to and from school from Aransas Pass, Texas, which is 28 miles from Corpus Christi. (JX-17, p. 89). The program is a full-time rehabilitation effort (12 hours per semester) which Ms. Johnson testified precludes Claimant from having outside employment in light of the unit requirements and the burden of spending extra time on some subjects which gave him difficulty. Claimant did not enroll in classes for the summer 2001 because of family issues with his young son, health and transportation difficulties. (JX-17, PP. 17, 23). Claimant is expected to attend classes on a full-time basis, maintain a minimum grade point average of 3.0 and to complete his course work and graduate in May 2003. (JX-25, p. 6; JX-17, p. 161; JX-34, p. 33).

Ms. Johnson testified that upon completion of the program requirements Claimant should be able to apply for mid-management or front line supervisor positions at local refineries. Although Claimant wants to seek a Bachelor's Degree, he understands that DOL expects him to go to work upon completion of the course program. (JX-25, p. 6). After graduation, both Del Mar College and Ms. Johnson will assist Claimant in his job search and placement. (JX-25, pp. 6-7).

On cross-examination, Ms. Johnson testified Claimant's expected wage-earning capacity upon completion of his Associate's Degree course work was $25,000.00-$30,000.00 annually. (JX-25, p. 8; JX-17, p. 89). She also performed labor market surveys on August 10,

2000, of the kinds of jobs Claimant could perform without any retraining based on his impairments, age and education. (JX-17, pp. 93-96). The labor market jobs were part-time and full-time positions paying $206.00-$310.00 a week as a deliverer or automobile self-service station attendant and $234.00-$320.00 a week as a hotel/motel desk clerk. (JX-25, p. 9; JX-17, pp. 87-88).

Upon reviewing Dr. Bryan's January 30, 2001 medical report of Claimant, Ms. Johnson testified her opinions would not change regarding Claimant's need for retraining into some other form of employment. Dr. Bryan's report confirms that Claimant was limited to lifting 30 pounds until May 2001, which she regarded as light work, but Dr. Bryan never examined Claimant again. From her file she affirmed that Claimant continued to require treatment from Dr. Heckman, never exceeded the light level of lifting and continued to have problems with his shoulder after January 2001. (JX-25, pp. 10-11).

Donald E. Weiner, Ph.D.

Dr. Weiner performed a psychological evaluation of Claimant on June 5, 2000 and July 10, 2000, at the request of Ms. Donna Johnson of DOL. (JX-15). In addition to conducting a clinical interview, Dr. Weiner administered the Wechsler Adult Intelligence Scale-III, Wide Range Achievement Test-Revision III, Minnesota Multiphasic Personality Inventory-II (MMPI) and Strong Interest Inventory. (JX-15, p. 10).

The Wechsler Adult Intelligence Scale reveals Claimant achieved a Verbal IQ of 87, a Performance IQ of 85 and a Full Scale IQ of 85 and was functioning in the low average range. Id. The Wide Range Achievement Test measured Claimant's grade equivalency for Reading and Arithmetic (high school level) and Spelling (7th grade) with no evidence of any specific learning disabilities. The MMPI revealed Claimant was attempting to present himself in an overly favorable light with no indication of any significant psycho-pathology, high levels of anxiety or depression or any psychotic symptomatology. (JX-15, p. 11).

Claimant's interest were in the areas of computer activities, data management, sales, mechanical activities and culinary arts. Dr. Weiner's diagnostic impression on Axis I was Adjustment Reaction with Anxiety and Depression. Claimant was recommended for vocational retraining in his areas of interest. (JX-15, pp. 11-12).

The Contentions of the Parties

Claimant contends he has established as of May 2, 2000, that he can no longer perform the physical duties of his former job and is therefore totally disabled. He further asserts that he suffered a general injury and is not confined to a scheduled injury recovery. He asserts he reached maximum medical improvement on or before September 30, 2001, and is thus entitled to permanent total disability compensation benefits.

Claimant maintains that Employer/Carrier are barred from showing suitable alternative employment because he was enrolled in a full-time DOL-sponsored vocational rehabilitation program from August 2000 until May 2003, which precluded his performing outside work, and thus he remained permanently totally disabled during his period of retraining. Since Claimant was enrolled in a DOL-sponsored rehabilitation program which precluded his employment, alternate employment is not suitable, realistic or available.

Claimant further avers that he is entitled to permanent total disability benefits during his retraining from August 2000 to May 15, 2003, based on his average weekly wage of $1,414.14. He seeks permanent partial disability benefits upon graduation from his DOL-sponsored retraining program on May 15, 2003 to present and continuing based on the difference between his average weekly wage of $1,414.14 and his stipulated post-retraining wage-earning capacity of $528.85 ($27,000 ÷ 52 weeks = $528.85). Lastly, Claimant seeks additional payments for the difference between his stipulated average weekly wage ($1,414.14) and the erroneous wage upon which temporary total benefit payments were made ($1,221.49) or a difference of $21.41 per week.

Employer/Carrier initially claim that Claimant has failed to carry his burden of proof in establishing a **prima facie** case. They assert, based on the opinions of the independent medical examiners, Drs. Bryan and Simpson, that Claimant reached maximum medical improvement on or about January 31, 2001. They further urge that suitable alternative employment was established through the labor market surveys conducted by Ms. Donna Johnson of DOL and therefore Claimant is only entitled to permanent partial disability benefits from August 10, 2000 to May 14, 2003, based on the difference between his average weekly wage and his wage earning capacity of $320.00 per week and from May 15, 2003, and continuing based on the difference between his average weekly wage and his wage earning capacity of $528.85.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Louisiana Insurance Guaranty Association (LIGA) v. Abbott, 27 BRBS 192 (1993), aff'd, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Although not re-urged in brief, Employer/Carrier's position at hearing was Claimant had only sustained an injury to his arm and was limited to a scheduled injury recovery under Section 8(c)(2). Claimant argues he suffered an injury to his shoulder for which he underwent shoulder surgery.

Claimant correctly points out that this case is factually similar to Pool Company v. Director, OWCP [Randy White], 206 F.3d 543 (5th Cir. 2000). In Pool, the Court analyzed the legislative and jurisprudential history of scheduled vs. unscheduled injuries and the concepts of situs of injury vs. situs of disability and concluded that an employee who suffers an injury to an unscheduled portion of the body, as here the shoulder, that impairs a scheduled portion (arm) may not receive benefits under the Section 8 schedule, but instead must recover under Section 8(c)(21). I find and conclude that Claimant suffered an injury to his shoulder and the rationale of Pool is equally applicable here. Thus, Claimant is entitled to recover for an unscheduled injury under Section 8(c)(21) of the Act.

Claimant credibly testified that he cannot perform the physical demands of his former job because of the limitations of his right shoulder and continuous pain associated with activity. He has difficulty reaching out and grabbing objects, pulling, reaching over head, climbing ladders, swinging on ropes, torquing wrenches and using sledge hammers. He testified Dr. Heckman never released him to return to his former duties and no treating physician has recommended that he do so.

It is well-settled that the opinions, diagnoses and medical evidence of a treating physician who is familiar with the claimant's injuries, treatment and responses thereto are entitled to considerable weight and greater weight than the opinions of non-treating physicians in administrative proceedings. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000); Scott v. Heckler, 770 F.2d 482, 485 (5th Cir. 1985). Thus, the opinions of Drs. Heckman and Ryan, Claimant's treating physicians, are entitled to considerable weight.

Dr. Heckman allowed Claimant to attempt a return to work from November 1999 to March 2000 at which time Claimant suffered flare-ups in his condition. Claimant was unable to sustain the physical demands of his former job. On May 2, 2000, Dr. Heckman opined that Claimant was not able to perform his past work because his duties were too strenuous. He recommended that Claimant be retrained in a more sedentary position. The activities which Claimant found difficult to perform, as noted above, were the basis for Dr. Heckman's assignment of permanent restrictions for future work activities.

Dr. Bryan, upon whom Employer relies, agreed that the work activities described by Claimant above could damage tissues and should be avoided in the future.

Vocationally, Ms. Johnson determined Claimant's past work as a lead operator was heavy in physical demand and, based on his limitations and restrictions, Claimant could no longer perform his former job.

No other treating or consulting physician rendered an opinion regarding Claimant's ability to return to his former employment. Dr. Ryan expressed no opinion about restrictions placed on Claimant or his date of maximum medical improvement. Dr. DeFrancesco opined that Claimant was not at MMI on February 24, 1999, when he conducted a one-time examination. On April 8, 1999, although Dr. Breckenridge recommended continued conservative care, he expressed no opinion on MMI. Dr. Trotter, who only examined medical records and conducted no physical examination of Claimant, concluded, without further explication, that Claimant's "end treatment date" would be September 21, 1999. Dr. Trotter expressed no opinion on Claimant's restrictions or any limitations placed on Claimant by Dr. Heckman. Neither physician performing an independent medical examination for DOL rendered an opinion about Claimant's MMI date. In fact, Dr. Bryan deferred to Dr. Heckman for assignment of a MMI date and disability.

Based on the foregoing, I find and conclude that Claimant established he cannot perform the physical duties of his former job as a lead operator due to the injury to his right shoulder and its residuals, to include symptomatology consistent with RSD or chronic pain syndrome, and thus has established a **prima facie** case of total disability. Accordingly, Claimant is entitled to temporary total

disability compensation benefits commencing on June 18, 1998, based on his average weekly wage of $1,414.14.[2]

Moreover, based on the opinion of Dr. Heckman, I find and conclude Claimant reached maximum medical improvement on November 19, 1999, at which time he returned to duty offshore with Employer. Dr. Heckman also assigned a permanent impairment rating of nine percent for Claimant's right upper extremity and a five percent whole person impairment. It is further noted that Dr. Bryan in effect deferred to Dr. Heckman for assignment of maximum medical improvement and disability because Dr. Heckman was a good orthopedist, had known Claimant longer and Dr. Bryan was only seeing Claimant on one occasion.

I place little probative value on the "end treatment date" offered by Dr. Trotter since he did not examine Claimant and had no role in the treatment and care of Claimant. Notwithstanding my discounting Dr. Trotter's MMI opinion, it is noted that his determination is only two months earlier than the date ultimately assigned by Dr. Heckman, who was in a better position to evaluate Claimant's progress. Therefore, having reached a level of permanency, the nature of any periods of disability accorded Claimant after November 19, 1999 would be permanent. Accordingly, Claimant is entitled to temporary total disability from June 18, 1998 to November 19, 1999, when he reached maximum medical improvement, excluding any modified periods of employment for which he received wages.

As discussed above, Claimant worked offshore from about November 19, 1999 until March 8, 2000, when he suffered a flare-up in his condition and underwent additional stellate blocks by his pain specialist. He testified he was paid his regular wages during this work period. He did not return to employment with Employer thereafter. Accordingly, I find Claimant is entitled to permanent

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[2] Although Claimant was paid temporary total disability compensation benefits for the periods set forth in paragraph seven of the Joint Stipulation, Claimant is entitled to an increased weekly amount of $21.41 for each week so compensated from June 18, 1998 to September 30, 1998, based on the difference between his stipulated average weekly wage and the wage on which he was compensated, $1,221.49. Based on the adjusted National Average Weekly Wage commencing on October 1, 1999 and for each yearly period thereafter, Claimant is entitled to additional increases in disability compensation benefits based on the difference between the calculated maximum compensation rate and the wage for which he was compensated.

total disability compensation benefits commencing March 8, 2000, and continuing, based on his average weekly wage of $1,414.14.

On September 15, 2001, Employer controverted Claimant's entitlement to compensation and ceased payments of benefits on September 30, 2001, alleging Claimant had been "released by DOL physician." (JX-3, p. 1). There is no record support for Employer's position that DOL physicians released Claimant. To the contrary, Dr. Simpson opined that Claimant's pain may increased in the future which may require additional surgical procedures and expressed no opinion that Claimant had even reached MMI. Dr. Bryan speculated that Claimant would completely recover in nine months and gradually increase his physical abilities to lift, neither of which occurred. Therefore, Employer continues to be responsible for permanent total disability compensation benefits to Claimant until Employer establishes suitable alternative employment, at which time Claimant's entitlement would change to permanent partial disability compensation benefits.

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042.

Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 530 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 530 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 530 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

These principles are preserved in the context of enrollment in a vocational rehabilitation program which precludes employment. Louisiana Insurance Guaranty Associations (LIGA) v. Abbott, supra; See Castro v. General Construction Company, ___ BRBS ___ (BRB No. 02-0783), issued May 13, 2003 (Slip Opinion, page 7).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment

to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

(1) Claimant's Vocational Rehabilitation

Employer/Carrier argue that since Ms. Johnson established suitable alternative employment on August 10, 2000, which Claimant was able to perform, he is only entitled to permanent partial disability compensation benefits after reaching maximum medical improvement. At the hearing, Employer/Carrier further argued that Abbott was a public policy decision of the Fifth Circuit and, in effect, neither the legislative history of the Act or its pertinent regulations intended an award of total disability benefits during vocational rehabilitation training where suitable alternative employment is otherwise available. Employer/Carrier also attempt to distinguish Abbott since Abbott had completed his vocational plan and Claimant has not.

Claimant avers that he has been enrolled full-time in a DOL-sponsored vocational rehabilitation program since August 2000 which has precluded him from obtaining outside employment, even on a part-time basis, given the demands of his school work.

Consistent with the vocational views of Ms. Johnson, Dr. Heckman, whose opinions are due considerable weight as a treating physician, opined on August 20, 2001, that Claimant's medical condition prevented him from returning to work since he was in a DOL retraining program. On April 1, 2002, Dr. Heckman assigned permanent restrictions to Claimant and concluded he could not do full-time or part-time work until "after completion of retraining."

In Abbott, the Board and the Fifth Circuit held that, despite an employer's showing of suitable alternative employment which the claimant was physically capable of performing, an award of total disability was appropriate on the facts presented. In so concluding, both bodies noted in Turner the Fifth Circuit recognized that the degree of disability is not assessed solely on the basis of physical condition; it is also based on factors such as age, education, employment history, **rehabilitative potential**, and the **availability of work** that a claimant can perform. Abbott, 27 BRBS at 204, 40 F.3d at 127 (emphasis added).

Thus, the Fifth Circuit agreed that an award of total disability benefits to Abbott was appropriate because the jobs identified by employer were unavailable and could not reasonably be secured while Abbott was enrolled full-time in a DOL-sponsored rehabilitation program. Abbott, 40 F.3d at 127-128. The Fifth Circuit also recognized that awarding total disability compensation

to Abbott served the Act's goal of promoting the rehabilitation of injured workers. Id., at 127. The Court stated that courts should not frustrate the DOL's rehabilitative efforts when they are reasonable and result in lower total compensation liability for the employer and its insurer in the long run. Id., at 128. However, under Abbott, it is Claimant's burden to prove that he is unable to perform suitable alternative employment due to his participation in a vocational training program. Id.; See Kee v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 221, 223 (2000); Brown v. National Steel and Shipbuilding Company, 34 BRBS 195, 196-197 (2001).

As noted in Castro, entitlement to benefits during enrollment in a vocational rehabilitation program under Abbott is not automatic, but depends on an analysis of various factors relevant to ascertaining whether employment is reasonably available. (Slip Op., at 7). "Specifically, if a claimant's rehabilitation agreement with OWCP prohibits him from extracurricular employment, or if the ALJ determines that the rehabilitation schedule prevents such employment, then employment is unavailable to the claimant." Id., at 8.

In Gregory v. Norfolk Shipbuilding and Dry Dock Company, 32 BRBS 264 (1998), the Board articulated the following factors to be considered in awarding total disability benefits during vocational rehabilitation: whether enrollment precluded any employment; whether employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; whether completion of the program would benefit claimant by increasing his wage-earning capacity; whether claimant showed full diligence in completing the vocational program; and other relevant factors. 32 BRBS at 266.

The Gregory criteria were developed from the facts supporting the award in Abbott and do not constitute a complete or inflexible standard. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse], 315 F.3d 286, 36 BRBS 85 (CRT)(4th Cir. 2002). The Fourth Circuit observed ". . . the guiding legal principles require consideration of a wide range of the relevant factors in reaching the proper result in each case." No one factor is dispositive of entitlement, thus whether an employer approved the vocational plan or it is reasonable are not dipositive. Castro, (slip op., at 10 n. 6); See also Brickhouse, 315 F.3d at 286 (Abbott may be applied even if rehabilitation does not increase post-injury wage-earning capacity); See Bush v. ITO Corporation, 32 BRBS 213 (1998)(factual differences with Abbott do not make it inapplicable).

The instant record does not reveal whether Employer/Carrier agreed to Claimant's DOL-approved rehabilitation plan. However, Claimant was enrolled and commenced retraining with Employer's knowledge and support since Employer/Carrier paid temporary total disability benefits to Claimant from the commencement of his rehabilitation retraining in August 2000 until September 30, 2001. I have previously concluded that there is no record support for Employer/Carrier's action to cease compensation payments for the reason advanced, i.e., DOL physicians released Claimant to return to work.

Claimant was approved by DOL to attend a two-year course in Industrial Management at Del Mar College in Corpus Christi, Texas. DOL paid his tuition, purchased his books and supplies and paid a $25.00 per week maintenance allowance for his mileage to and from school. The rehabilitation program required Claimant to attend school full-time, maintain a 3.0 grade point average and graduate and complete his course work in May 2003. Ms. Johnson testified the rehabilitation retraining program precluded Claimant's outside employment in light of his school requirements and the extra burden of spending time on remedial and tutorial work in Math and English, which gave him difficulty.

Claimant credibly testified he could not have worked a part-time job for 10 hours per week during his rehabilitation retraining, because he did not have 10 hours to devote to work. The record discloses that he commuted 28 miles from his home to campus daily for classes, labs and tutorial work. Given his study requirements in the evening, he also candidly stated he was lucky to sleep four hours per night. Buttressing Claimant's view, Dr. Heckman opined Claimant was restricted from any full-time or part-time work until he completed his DOL retraining.

Accordingly, based on the foregoing, I find and conclude that Claimant was required to attend school full-time and complete his studies at an above-average level of academic success which was time-consuming and difficult for Claimant given his daily commute, remedial and tutorial work and study requirements. Medically, he was restricted from any work activities. I therefore find that Claimant was precluded from performing any identified suitable alternative employment, if such were available during his retraining period. Moreover, as noted below, the three positions identified by Ms. Johnson do not constitute suitable alternative employment in my judgment for the reasons stated.

Furthermore, Ms. Johnson testified that upon completion of his retraining program as an Industrial Manager, Claimant could expect a wage-earning capacity from $25,000.00 to $30,000.00 a year. The

parties stipulated that Claimant would have a post-retraining wage-earning capacity of $27,500.00 a year, an average of his earning capacity range, beginning on May 15, 2003, which equates to a weekly earning capacity of $528.85. Assuming suitable alternative employment had been shown in the jobs identified by Ms. Johnson, the highest earnings available to Claimant would have been $320.00 per week or $16,640.00 per year ($320.00 x 52 weeks = $16,640.00). Thus, after retraining Claimant would have the potential to earn $208.85 more per week ($528.85 - $320.00 = $208.85) or $10,860.20 more per year ($208.85 x 52 weeks = $10,860.20). It is axiomatic, and I so find and conclude, that Claimant's completion of the vocational rehabilitation retraining program would result in an increased wage-earning capacity, thereby maximizing Claimant's skills and increasing his long-term earning potential and simultaneously minimizing Employer's long-term compensation liability.

Moreover, Claimant exhibited full diligence in completing his retraining program given his tested intellectual capacity, the commute to and from school, time necessary for classes, labs, tutorial and remedial work and home studies. Further, Claimant was diligent in completing the rehabilitation program in the face of academic, financial and parental difficulties. Ms. Johnson noted his motivation and desire to return to work after vocational retraining.

Based on the analysis of the foregoing factors, I find and conclude that even if the jobs identified by Ms. Johnson were suitable for Claimant and were available during his retraining, he could not have realistically secured and sustained such employment due to his participation in the DOL-approved and sponsored rehabilitation retraining plan which precluded him from working. Accordingly, Claimant is entitled to continuing permanent total disability compensation benefits from March 8, 2000 through May 15, 2003, when he is scheduled to graduate from his vocational rehabilitation program with an Associate's Degree in Industrial Management. Thereafter, based on the factual stipulation of the parties that Claimant would have a wage-earning capacity of $27,500.00 annually or $528.85 weekly, he is entitled to weekly permanent partial disability compensation benefits based on two-thirds of the difference between his average weekly wage of $1,414.14 and his post-retraining weekly wage-earning capacity of $528.85.

(2) The Identified Suitable Alternative Jobs

Employer/Carrier argue that suitable alternative employment was established and available to Claimant during his rehabilitation training and therefore he is not entitled to total but only partial disability for such period.

Employer relies upon the labor market surveys prepared by Ms. Johnson of DOL on August 10, 2000. However, I find and conclude the specific physical demands or requirements of the jobs identified by Ms. Johnson do not comport with the restrictions assigned by Dr. Heckman.

The outside deliverer position involved "traveling on foot or by bicycle, motorcycle, automobile or public conveyance" and "may involve significant stand/walk/push/pull," frequent reaching and handling and frequent environmental exposure to weather. (JX-17, pp. 93-94). Dr. Heckman restricted Claimant to limited operation of a car or other type of motor vehicle and from any pushing and pulling with the right shoulder, no reaching "on right," and from environmental exposures to "cold, dampness, temperature changes." I find, based on the record evidence, that the outside deliverer position does not constitute suitable alternative employment in that its demands do not comport with and in fact exceed Claimant's restrictions.

Ms. Johnson did not complete or proffer a detailed job description for the position of self-service station attendant and, accordingly, no comparison with Claimant's restrictions can be made. Therefore, I find and conclude, in the absence of the necessary details to conduct a determination of suitability, this position does not constitute suitable alternative employment.

The hotel clerk position also "may involve significant stand/walk/ push/pull," occasional reaching and handling and good math skills. (JX-17, pp. 95-96). Claimant was required to take remedial Math courses and sought tutorial help in Math and, therefore, it is questionable whether he has "good math skills" for purposes of competing for and sustaining this position. I find and conclude, for reasons expressed above regarding the deliverer position, that the hotel clerk position does not constitute suitable alternative employment in that its demands or requirements exceed Claimant's restrictions.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

It is undisputed that Employer/Carrier have paid Claimant's medical expenses and costs. Since Claimant suffered a compensable injury, Employer/Carrier remain responsible for Claimant's reasonable and necessary medical benefits related to his work injury of June 17, 1998 and its sequelae.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone

v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

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[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 30, 2002**, the date this matter was referred from the District Director.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 18, 1998 to November 19, 1999, excluding any periods of modified employment for which he received wages, based on Claimant's average weekly wage of $1,414.14, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from March 8, 2000 to May 14, 2003, based on Claimant's average weekly wage of $1,414.14, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from May 15, 2003 and continuing based on two-thirds of the difference between Claimant's average weekly wage of $1,414.14 and his reduced weekly earning capacity of $528.85 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 18, 1998 work injury, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days from the date of service of this Decision and Order by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 30th day of July, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge